IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 283

JAMES VICTOR SALEM,

Petitioner,

—against—

UNITED STATES LINES COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

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Opinions Below

There was no formal opinion by the trial Judge, W. W. Ritter, *D.J.*, in the United States District Court for the Southern District of New York. The opinion of the Court of Appeals for the Second Circuit, with a dissenting opinion by Smith, *C.J.*, is reported at 293 F. 2d 121 (R. 199). The first denial of a petition for rehearing on June 21, 1961 by Watkins, *D.J.*, and Friendly, *C.J.*, with Smith, *C.J.* again recording his dissent, is not officially reported (R. 210). After the instant petition was filed on August 3, 1961, an order was entered on August 7, 1961 by the Court of Appeals denying a petition for rehearing *en banc*, incorporating a memorandum by Waterman, *C.J.*, reported at 293 F. 2d 126 (R. 211).

Jurisdiction

Judgment was entered in the United States Court of Appeals for the Second Circuit on June 9, 1961, and a petition for rehearing *en banc* was denied on August 7, 1961. The instant petition was timely filed on August 3, 1961 and was granted on October 9, 1961. Jurisdiction to review the judgment by writ of certiorari is found in 28 U. S. C. §1254 (1) and 2101, as well as Rules 19(b) and 20 of the Rules of this Court. The Jones Act (46 U. S. C. 688) was the basis for federal jurisdiction in the Court of first instance.

Statute and Constitutional Provision Involved

The Jones Act, 46 U. S. C. 688, as follows:

> "Recovery for injury to or death of seaman: Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; . . . Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. Mar. 4, 1915, c. 153, § 20, 38 Stat. 1185; June 5, 1920, c. 250, § 33, 41 Stat. 1007."

Constitution of the United States; Seventh Amendment:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury,

shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Questions Presented

1. Should a general verdict for a seaman by a jury in a Jones Act case be set aside by the Court of Appeals because of the absence of testimony by an expert on naval architecture, with respect to a simple issue of obvious danger, not involving any complex or technical details beyond the ken of a lay juror?

2. Is testimony by an expert on naval architecture with respect to the need for, or the feasibility of construction of a railing or safety device, necessary to support an instruction to the jury that a verdict for the plaintiff might follow "If you find the defendant was negligent in failing to provide railings or other safety devices," related to a platform adjacent to a man-sized opening, 31 feet up in a swaying radar tower, completely enclosed and in absolute darkness, where substantial testimony by officers and crew members, supplemented by photographs and diagrams, clearly demonstrated the negligent absence and need of a railing or guard line?

3. Where the trial Court by consent of the parties passed on the cause for future maintenance and determined from the voluminous medical evidence that petitioner was deserving of an award for three additional years, stating his reasons therefor in the record, was this "clearly erroneous" and defective in form and reversal otherwise justified on a ground expressed in the majority opinion that " . . . the Supreme Court seems to have indicated that no payments should be made for future maintenance and cure"?

Statement of the Case

Petitioner had been employed aboard the SS United States since September 1956, first as an ordinary seaman and then shortly thereafter as a Lookout A/B. His competence as a good worker, and the absence of any complaint, illness or injury prior to the instant accident are unquestioned. Since the accident on February 16, 1958, and by reason thereof, he is permanently not fit for duty as a seaman and is still undergoing rehabilitation.

Petitioner's causes of action for unseaworthiness, negligence, and maintenance in the past and for the reasonably foreseeable future were grounded on the following items of fault, fully supported by references to the record hereinafter:

1. That the crow's nest platform on which he had to step from the ladder and walk to his station was smooth, partly worn away and without any hand-holds, railings or life-lines, while the vessel was coursing a winter sea with excessive vibration, pitching and rolling, transposed particularly to the 65-foot high radar tower near the bow.

2. The crow's nest platform within the radar tower was not painted with any skid-proof material. Respondent's answers to interrogatories that it was so painted were shown to be untrue by the testimony of its own Bos'n.

3. The unseaworthy condition of the five lights in the fully enclosed radar tower had long existed, particularly the absence of any illumination from the upper two lights that would have cast light on the crow's nest platform below them. These upper two lights had been out for at least two voyages, and the complaints and inadequacy of the sockets and bulbs were known to responsible crew members

and officers for a substantial time prior to February 16, 1958.

The two bulbs below the crow's nest platform were also unlit and had been the subjects of attempted but unsuccessful repair several days before. The relationship of the remaining light to the accident at the crow's nest platform, which was shown to be smooth and worn, without any railing or life-line, is described in the majority opinion, as follows:

> "Plaintiff ascended the ladder to the platform at the level of the crow's nest and stepped with his left foot from the ladder to the platform. As he was carrying over the right foot, the remaining light in the tower went out, and the area was in complete darkness. His testimony is not clear as to whether he fell in the process of bringing his right foot onto the platform, or whether the fall occurred after he had both feet on the platform. At any rate, he fell, striking his head on the ladder, and his back on the edge of the platform" (R. 201).

4. The negligence of the relief A/B Lookout Richards, acting in the course of his employment for the respondent, is clearly grounded in his own testimony and that of the petitioner. Though Salem's second fall for a distance of 8 feet was consequential on the unseaworthiness of the platform and the lights, there was absent any request by respondent for special interrogatories to delineate the findings by the jury. The record clearly shows that despite the inability of the seriously disabled and dazed petitioner to respond to several requests by Richards as to whether he could be left alone, he was placed on a narrow ledge with both feet dangling into the open space of 30 feet, with his arm around an aluminum smooth and cumbersome pipe

casing, wherefrom he fell again after Richards left to enter the crow's nest proper to telephone the bridge. This telephone could have been reached by Richards while remaining on the platform and close to Salem to heed his second cry for help and hold him on the precarious perch to which he had been placed by Richards.

The majority below concedes this alone would have supported the judgment for petitioner had there been a special finding. Because there was no request for special interrogatories the Court and parties relied on a general verdict. The majority reversed the general verdict, though conceding it was amply supported by proof of negligent rescue and on the issue of inadequate illumination, as follows:

> "As to the issue of whether plaintiff should have called someone to replace the burned out light-bulbs, the jury apparently resolved it in plaintiff's favor, and it is not proper for this court to retry factual issues where there is evidence to sustain the finding below. There is such evidence in this case" (R. 206).

Hereinafter we concisely set forth the factual picture with specific references to the record, as they relate to the questions presented for review:

1. *The dangerous and unseaworthy condition of the crow's nest platform*: At the time of the accident the log entries indicate the vessel was rolling and pitching easily in a rough west northwesterly sea with a moderate average northwesterly swell, seven degrees portside and six degrees starboard side, the weather overcast with passing rain squalls (R. 148). The vessel was subject to a great degree of vibration, which the chief quartermaster admitted adversely affected the wiring in the tower (R. 152, 153). Respondent's witness Richards testified that there were no per-

forations on the crow's nest platform, that it was smooth and partly worn away (R. 159, 161). There was absent any handholds, rails or lifelines at that level (R. 160). Salem's testimony as to the smooth and slippery condition of the unpainted platform, the absence of handholds, and that the pipe casings were too big and cumbersome to grab when coming onto the platform from the ladder, were corroborative of Richard's testimony (R. 16, 17). His prior experiences required him always to be very careful when stepping from the up and down ladder onto the platform (R. 31, 32).

Respondent had previously given untrue answers to supplemental interrogatories propounded by petitioner by stating that slip-proof paint had been applied to the platform on December 23, 1957 by members of the crew, a product of "National Slip-Proof." Respondent's witness, Bos'n McGhee, unequivocally testified that only aluminum paint, not skid-proof, had been previously applied (R. 157). There was no proof produced by defendant to the contrary. The photographs of the platform taken by respondent six months after the accident (R. 149, 150) depicted skid-proof paint that did not pertain on February 16, 1958. The Bos'n's record of painting inside the radar tower related "just aluminum paint" (R. 47, 48). The platform was subject to condensation or "sweat" because of the differences in temperature inside and outside the tower (R. 187).

The deposition of Trendell Terry sets forth the need for a railing or similar device at the crow's nest platform. When he testified he was still employed by respondent, having served with it since 1950 (R. 217), and with the experience of 160 to 186 voyages on the S.S. United States, as a Lookout A/B, having used the ladder and platform in question about 88 times each voyage. On page 92 he refers to the smooth and slippery condition of the platform, with-

out any non-skid paint, and further "There certainly should have been a railing or life lines on this platform to grab" (R. 218). He described the large and cumbersome pipe casing as the only handhold available, in the following words:

> "... but it's not very convenient because it's so big and round, big and bulky, that you couldn't get a good grip . . . I never use it" (R. 217).

Terry also confirmed the absence of any life line, its purpose meant to be a "safety measure to grab hold onto to protect yourself until you're safe" (R. 217).

Similarly did Louis Tribble, the other A/B lookout testify on the absence of a necessary safety device. By deposition (Pl. Ex. 18, R. 214), he recited his extensive marine background, including a rating as a second mate (R. 214). With respect to the rectangular pipe casing referred to in the majority opinion below, he testified he never used it as a handhold for the following reasons:

> "A. Well, because I don't ever grab hold of anything that has electrical current going through, plus the fact that it was too big to grab hold of" (R. 215).

He also affirmed there was nothing on the platform "to grab hold of or to bridge over the space" (R. 215).

Richards also testified that there was absent any handholds, rails or lifelines at the crow's nest level, corroborating Salem who testified that the pipe casings were too big and cumbersome to grab when coming onto the platform from the ladder.

2. *The dangerous and unseaworthy condition of the lights within the radar tower*: Petitioner had not seen the two upper lights illuminated for approximately five

months prior to the accident (R. 14, 19), and Richards testified that the two lights had not been lit for at least two voyages, including the voyage of February 16, 1958 (R. 158, 159). It was also Richards' testimony that if the upper lights had been on they would have illuminated the crow's nest platform (R. 159). Respondent's attempt to prove that all lights had previously been on cannot be justified by any reference to the testimony, as chief officer Ridington testified that he knew that the accident occurred with all the lights out (R. 51), and in fact the assistant to the chief electrician D'Andrea, replaced but three of the five light bulbs in the tower immediately after the accident (R. 155), which points to the continuing disregard for the upper illumination that would have reflected down to the crow's nest platform.

Where respondent seeks to charge Salem with an obligation to obtain and replace lights, the testimony of respondent's witness, second electrician Rivas, is noted that no one but himself was supposed to put in bulbs and that he did not supply any bulbs to the crew (R. 155). Petitioner testified that only on one prior occasion had he ever replaced a bulb (R. 149) and before the accident there were no spare bulbs available (R. 183). He recalled that on prior occasions, every time, lights were out (R. 149). Chief quartermaster Barton stated that he had previously noted and reported trouble with the radar tower lights to the ship's electrician, "some time in the middle of February in 1958", more specifically six days before the accident. Then he informed the chief electrician that three bulbs had burned out (R. 34, 35).

Third assistant engineer D'Andrea testified that he assigned the second electrician Rivas to check "what might be causing lamps to burn out" (R. 39), but he himself did not inspect the work done (R. 153). D'Andrea affirmed that

household bulbs were used, not anti-vibration or "rough service bulbs" (R. 153) and that the vessel carried twelve unlicensed electricians and two engineers in the electrical department (R. 37), "as lamps are burned out, these men are primarily assigned to lamping up the ship" (R. 37), to replace 500 to 600 burned out bulbs a day on an average voyage of 11 to 12 or 15 to 16 days (R. 38). This is related to colloquy by respondent's attorney who attempted a distinction when one didn't exist, as follows:

> "Most of us are familiar with bulbs burning out in a home and I want to show the difference between a ship bulb and a home bulb" (R. 37, 38).

There was no difference as the bulbs used were of "Normal household quality—Mazda lamps, General Electric" (R. 39).

The prior written statement to respondent by the second electrician Rivas, that he renewed two sockets on February 10, 1958, omits reference to checking from February 10th to February 16th, despite knowledge of the frequent blow-outs of the radar tower bulbs (R. 156). The statement admits that " * * * the two bottom lights were burning out too often" and though he was sufficiently suspicious of the lower two sockets and replaced them, he could not find that the replacements made any difference (R. 44, 45). He admitted that the chief quartermaster advised him "The two bottom lights were going off and on too often" but his inspections of the lighting conditions in the radar tower were done only twice each trip (R. 44). It was petitioner's testimony that he had previously noted much trouble with the bottom lights, though immediately before the accident the light at the crow's nest level was on. He affirmed that it was the sole job of the electricians to work on wiring and the lights (R. 15, 21), and that the two lights above, never

on, would have shone down on the crow's nest platform (R. 19). At the time petitioner came to his watch at 12 midnight, when he noted that only the crow's nest light was on (R. 20), he discussed the absence of light with Terry, whom he relieved (R. 20, 21).

3. *The accident, Richards' negligent attempt at rescue and the conditions related thereto*: Salem testified that while in the process of moving his right foot over onto the platform from the up and down ladder, the sole remaining light went out and "I get scared" (R. 22, 23). He slipped and fell backwards, striking the ladder with his head, saving himself by grabbing the rungs, while his lower back struck the platform to prompt excruciating lumbar pain (R. 23, 24). Petitioner had slipped just after he had released his hold on the casing, a means used by him to swing over from the ladder, and both hands were then at his side, as he hadn't time to extend his arms to reach the sides of the radar tower (R. 26, 27, 28). He screamed, and Richards came out feeling for him, grabbed his hand and sat him down on the edge of the platform (R. 24, 25). Salem stated that Richards talked to him several times, about three or four, while he was dizzy, and asked "Can you hold yourself" and he finally answered "Yes, I guess so" (R. 25). When Richards left, Salem became more dizzy, called out "Richard, Richard, please, I am getting weak, I can't hold myself longer, I am getting weak, I am getting weak" and then he fell some distance below (R. 25). He testified that he had been left by Richards, after being seated by him on a narrow ledge with both feet dangling into the 30 feet open hole (R. 25).

It was Richards' testimony that he heard a noise, opened the door and observed complete darkness (R. 158); that Salem did not knock on the door to the crow's nest, in contradiction to the statement obtained from petitioner while

he was under gross sedation in the ship's hospital and incapable of clearly expressing what had occurred (R. 150, 151, 159, 164). Richards affirmed that he had asked Salem three times if he could leave to make the call, that Salem kept complaining of back pain and finally said "All right" (R. 160). Petitioner's painful reaction when his leg was touched prompted Richards to pull him in by his arm (R. 55). With respect to moving petitioner to a more safe position, Richards testified " * * * I didn't want to move him from that place, to move him in a safe position * * *," because Salem was in pain and wouldn't allow himself to be touched, and " * * * I was afraid to touch him, and at the same time I preferred to leave him where he was" (R. 57). In Court, as a witness for the respondent, Richards testified that he had left Salem with both feet on the platform, not dangling, and after he remained there "a few minutes or so * * *," then went into the crow's nest (R. 57, 58). In a prior written statement given by Richards to petitioner's counsel, he had stated a contradictory version that "He was sitting aft of the cable line with body facing portside and his legs laying over the edge of the platform, in open space" (R. 161, 162).

Though the telephone was only two feet from the door (R. 56) and there is a stipulation by counsel for respondent that "I agree that the door does not cover over the telephone" (R. 52), Richards nonetheless went inside the crow's nest and abandoned Salem. After he heard him scream for help again, Richards ran out and felt that he was no longer on the platform. He returned and called for the third officer Gregware, then on duty, who came with a flashlight and they both visualized Salem hanging about eight feet below the crow's nest platform (R. 56)). It is significant that Richards admitted he could have reached the telephone while still on the platform and near the

petitioner (R. 160), which is corroborated by Terry (R. 189). He had never been issued a flashlight (R. 159) and once illumination was obtained from Gregware, he helped pull the injured seaman up again to the level of the crow's nest (R. 56).

Gregware testified there was no light in the radar tower when he came to the scene (R. 163), that he first waited for Richards to grab Salem and then he ascended (R. 163). In a prior written statement given to the respondent, he stated that he observed Salem in a state of shock and delirious (R. 163, 164). The condition of the lights right after the accident was affirmed by D'Andrea who stated he went to the tower and saw that all the lights were out (R. 164), and flashlights were being used to light the interior (R. 155).

4. *Petitioner's injuries, hospitalizations, medical testimony on diagnosis and prognosis*: The 37-year-old petitioner had joined the S.S. United States in September, 1956 as an ordinary seaman. Thereafter he was soon promoted to the responsible capacity of Lookout A/B (R. 149). His several pre-voyage physical examinations while in respondent's employ were unremarkable (R. 148, 149), and there was no entry produced from any medical log or surgeon's journal of an illness, complaint or injury to Salem prior to February 16, 1958. His boatswain McGhee affirmed that his work was satisfactory and he got along well with the other seamen (R. 157), on which Terry stated that before the accident petitioner was "very relaxed all the time" (R. 189). His annual earnings were $5,656.76 (R. 181), a loss of over $15,000 to the time of trial.

The terror and trauma of the instant accident produced such profound physical and psychiatric changes that he is permanently unemployable as a seaman and in need of

extensive orthopedic and psychiatric treatment and rehabilitation. In concise chronological order we shall hereinafter discuss this aspect of the case and relate it to respondent's contentions that were unacceptable to the jury.

(a) On the ship there was fully recorded the extensive complaints, findings and treatments rendered for the crucial two days following the accident and before the ship docked to allow petitioner to be removed to the U.S.P.H.S. Hospital by ambulance for years of subsequent inpatient and outpatient treatment. The ship's hospital record was never sent to the successor hospital to permit a continuing knowledge of symptoms and allow a diagnosis based on the full medical history. Instead, a comparatively short and incomplete letter was sent by a Dr. Fenger, the ship's doctor, which is not referred to in any of the volumes of subsequent hospitalization, and cannot compare with the actual ship's medical entries made the first two days. Dr. Fenger was not produced as a witness and neither of respondent's medical experts was afforded the opportunity to see the ship's medical log, except Dr. Hyslop who first saw it long after his examination and report, on the morning he was to testify (R. 184, 193). This proof of withholding the ship's medical log from the successor hospital and respondent's own medical experts was related to the weight of their diagnoses and testimony, not to any issue of failure to treat.

The ship's personal injury report recites the following injuries:

> "Probable fracture or dislocation of vertebra with spinal nerve injury. Paralysis and anesthesia right leg. Concussion of brain. Sedation, bilateral traction of both legs; hospitalized 16 through 18 of February, '58" (R. 148).

Third officer Gregware who helped rescue petitioner had stated that Salem seemed in shock, "just like delirious there", and that the slightest touch seemed painful (R. 163, 164). Richards' testimony on that is referred to *supra*, and petitioner also testified as to excruciating pain, screaming with movements of the vessel, numbness in his right leg, given many injections to allay pain, immobilized by traction weights and given "fluid from a bottle * * * in the arm" (R. 150, 164).

All this is corroborated and supplemented by the medical log itself. Therein exhaustively is recorded that Salem had no sensation on urination, with almost complete nerve paralysis in the right leg, able only slightly to move his right great toe, immobilized in Trendelenberg traction, 15 pounds for each leg, a rise in blood pressure, confused at times and administered intravenously 5% Q.W. and many analgesics when "screaming with pain caused by ship's rolling," an irregular pulse and observed to have "very dark areas around nose and eyes" (R. 54, 169, 170, 176, 179).

(b) At the U. S. Public Health Service Hospital, Stapleton, S. I., Salem arrived by ambulance, tied down in a stretcher, admitted while in a confused mental state (R. 165, 173).

Traction was reapplied and Salem was confined to bed for approximately one and a half months this first time (R. 165). His many periods of inpatient and outpatient treatments, with the exception of a few weeks when he unsuccessfully attempted to return to sea, are chronologically recited in the record (R. 165, 166, 167).

We can only refer to some of the hospital findings, as space does not permit a comprehensive review of the many diagnoses and prognoses made in the orthopedic and neuro-

psychiatric departments of the hospital. There is noted a "weakness right leg probably due to nerve root irritation, L-5" (R. 193), myofascial disease and a "chronic schizophrenic reaction, undifferentiated type, conversion reaction, spondylolysis L-5, with first degree spondylolysthesis" (R. 170). There is also noted a record of paralysis of the small intestine in the area of the lumbar spine, technically called a reflex ileus (R. 173), as well as positive Lasegue tests (R. 180). A September 16, 1960 entry sets forth—"do not believe that this patient will ever be fit for sea duty when back condition and N.P. situation considered together" (R. 185); and there are also hospital notations of Salem frothing at the mouth and losing consciousness (R. 170); that he had a seizure and was confused, "eyes appear blurred, rolling about, not focusing * * * attack of screaming", subject to fears, head and back aches, sleeplessness (R. 172). During the period of his treatment petitioner was furnished three braces for continuous use, to wear for immobilization of his back, wearing one at the time of trial while still in pain (R. 181, 182). The diagnosis of November 16, 1960 sets forth that he was not fit for duty orthopedically and was to return on December 16, 1960 (R. 167), the latter date subsequent to the trial's end.

(c) The testimony by all the medical experts favor petitioner. Neither Dr. Hyslop nor Dr. Balensweig were able to state for respondent that Salem is without disability (R. 185, 193, 196). On a hypothetical question posed to Dr. Balensweig, exclusive of his examination but based on the record, assuming the facts that were not afforded him with respect to the initial ship's hospital record (R. 193, 194, 195), he testified that "On the hypothetical question that you have propounded I would say he is not fit for duty" (R. 196). Dr. Balensweig's examination dis-

closed positive findings, including muscle spasm that can be related to nerve root involvement (R. 195); Dr. Hyslop, though he contested the judgment of the impartial medical examiners at the Public Health Service Hospital as "istrogenic responsibility" (R. 184, 185), did so in a report made without the benefit of the ship's hospital records before him (R. 184).

It was the conclusion of Dr. Graubard, a traumatic surgeon, and Dr. Kaplan, a neuropsychiatrist, that petitioner was permanently disabled, never again able to return to sea, and suffering from the effects of a herniated intervertebral disc and a severe mental condition, traumatically caused.

Dr. Graubard's positive findings and conclusions are as follows: That on the occasion of his examination he noted a flattened lower back, restriction in lateral bending to 20°, atrophy of the right thigh of ½ inch as compared to the opposite member, a positive jugular compression test (R. 168), nerve damage, and in reference to the absence of sensation of urinating aboard the vessel it was his testimony that this showed "a great relationship between injuries to the spinal cord, especially in the lumbar area, and urinary disturbances. It is very frequent and very common" (R. 169). The inability to move his right great toe aboard the vessel was indicative of nerve interruption, particularly the sciatic nerve (R. 169, 170), and an asymptomatic congenital back condition was more prone to this trauma (R. 171), thereby prompting a diagnosis of a herniated disc superimposed upon a congenital defect known as spondylolysthesis (R. 171). It was his conclusion that with respect to the back condition alone Salem would not ever be "capable of returning to work as a seaman at all", expressed with a reasonable degree of medical certainty (R. 172).

Dr. Kaplan testified that the psychiatric complaints could be more disabling than the physical injury itself (R. 174), and on his examination he examined the hospital records as well as the patient, and noted that the pain described approximated the fifth lumbar nerve root in the radiation distribution (R. 175). He also found bilaterally positive Lasègue signs (R. 175). On the first examination performed July 7, 1958, Dr. Kaplan did not have the ship's hospital records, but they were available to him for the second examination on October 18, 1960 (R. 174, 175). At the time of his first examination Dr. Kaplan concluded the patient had a nerve root irritation at the fifth lumbar and first sacral nerve root levels, probably due to a herniation of a disc, as well as a conversion hysteria or a hysterical reaction, and that this condition was susceptible to further exacerbation (R. 175, 176). The reflex ileus due to back trauma, recorded in the hospital records, was described as a reflex response to irritation of nerve roots which enervate or supply the small bowel and is consistent with trauma sufficient to cause a herniated disc at the L-5 level (R. 176, 177). When petitioner's counsel attempted to examine the doctor with respect to the past family history, this was precluded by reason of the Court's prior admonition during an off-the-record discussion, to which Mr. Connor did not comment to show that he wished this prior history as part of the case (R. 177, 178). With respect to the finding of chronic schizophrenia, he described it as a psychotic illness related to a severe post-traumatic neurotic reaction which bordered on or actually was psychotic while he was in the hospital (R. 178). He concluded from his second examination that Salem had a severe conversion hysterical reaction, "undoubtedly part of a schizophrenic reaction * * * and that this was apparently precipitated by the accident in February of 1958. I noted also that he still had complaints and findings indicating that there was per-

sistent nerve root irritation" (R. 178). His prognosis was that because of the long duration of disability the likelihood of improvement was remote and that it may be that petitioner would get worse and require more specific orthopedic or neurosurgical therapy (R. 179). This is compared with the September 16, 1960 hospital notation that his congenital condition on which the trauma was imposed makes Salem an "impossible candidate for any surgical treatment" (R. 185, 186).

With respect to past maintenance there was an agreement between counsel as to how much had previously been paid, and deducting that from the total owed at $8 a day the figure of $5,208 was arrived at. Future maintenance in the amount of $8,760 for a three year period was granted, and the following reasons by the Court are recorded.

> "The Court: It seems to me that the poor man ever since the accident in 1958 has been trying to get relief from this condition, trying to get some assistance, to get well, to get on his feet. He made a couple of attempts to go to sea, which was unsatisfactory. There is a report in the medical record that he is still not fit for duty. He has a rehabilitation program to go through. There is a long medical history here, exhaustively gone into on the trial of this case. In my view he has not reached that point where maintenance should be cut off. At this time my judgment is three years is a reasonable time within which to anticipate that he is going to need it, and I am going to allow it upon that basis, and on the basis of the $8 a day" (R. 139).

This was reversed and remanded by the Court below on the following:

"Whatever the respective merits of a lump sum payment as against successive law suits in the ordinary legal setting, the Supreme Court seems to have indicated that no payments should be made for future maintenance and cure" (R. 205).

Summary of the Argument

The majority opinion erroneously predicates reversal of a jury verdict in favor of a Jones Act seaman for maritime negligence and/or unseaworthiness on the basis of a disjunctive, either arm of which is without support in the record and presents an obvious invasion of the jury's province to decide a simple question of fact, not complex or technical, pertaining to ordinary standards of conduct of safety and danger. It states that the trial Judge gave an "erroneous and prejudicial instruction" (R. 200) that their verdict should be for the seaman "if you find the defendant was negligent in failing to provide railings or other safety devices" (R. 202), on the alternate grounds that "There was no evidence of any kind in the record to support the view that railings or other safety devices could feasibly be constructed, or that failure to provide them constituted negligence or made the ship unseaworthy" (p. 123 of 293 F. 2d, R. 202).

The issue is drawn on the first alternative by Judge Smith's dissenting opinion wherein is stated that an expert on naval architecture should not testify where "Here the potential danger was fairly obvious and a jury should be perfectly competent to decide whether the handholds furnished were sufficient to discharge the owner's duty to provide his seamen with a safe place to work" (p. 126 of 293 F. 2d, R. 208). In the order on the petition for rehearing *en banc*, Judge Smith is joined by Judges Clark and Waterman. Judge Smith adds in a footnote com-

ment that it could not be conceived how the construction of a railing on an indoor platform would not be "feasible", but as such contention is made by the majority " . . . it would seem more sensible to have the defendant introduce such evidence" (R. 208). Parenthetically, the record is bare of any contention made by respondent at trial that it was not "feasible" to construct a railing or other safety device around the deep and man-sized opening which petitioner had to span from a dangerously awkward position on the ladder.

As to the second arm of the disjunctive reasoning for reversal, that failure to provide a railing or other safety device was not supported by evidence to show that "failure to provide them constituted negligence or made the ship unseaworthy", the record is replete with proof to the contrary.

Instead of applying decisional precedents as to the shipowner's absolute and non-delegable obligation to provide safe and seaworthy appurtenances and appliances, the majority below applied a different standard of whether " . . . proper marine architecture required the additional provision of railings or other safety devices on such a ladder or platform enclosed wtihin a tower leading to a crow's nest" (R. 202).

The majority has overlooked the ample testimony for petitioner on the lack of and need for a protective railing, or a guide rope or similar simple device, related to a platform adjacent to a man-sized opening, 31 feet up in a swaying radar tower of a vessel proceeding in a winter sea at its record speed, completely enclosed and in absolute darkness, where substantial testimony by officers and crew members set forth *supra*, under Statement of the Case, supplemented by photographs and diagrams, clearly demonstrated the absence and need of a railing or guard line.

This was a general verdict sought by the parties without a request for special interrogatories. It is conceded in the majority opinion that the record discloses substantial evidence to support some of petitioner's contentions of liability, on any one of which the verdict may be sustained. On this, as well as the uncontradicted proof of the total absence of illumination, petitioner's abandonment by Richards, the slippery nature of the platform, etc., a directed verdict for petitioner below would have been proper. Accordingly, even if there were error in a small part of the Charge, which is denied, the complete picture of respondent's fault renders any such error immaterial and harmless.

The majority opinion below erroneously imposes an additional burden on petitioner. Not only is he required to prove an unsafe place to work and/or unseaworthiness causally related to his injuries, but also to prove the shipowner could have made an obvious danger safe and seaworthy. Respectfully, this is contrary to accepted principles of negligence and general maritime law, which require a shipowner to exercise reasonable care under the principles of negligence and imposes liability irrespective of due diligence for unseaworthiness.

Petitioner contends that the majority opinion dilutes the decisional authority that it is the shipowner's absolute and non-delegable duty to provide its seamen engaged in the ship's service with a safe and seaworthy vessel and equipment. The majority opinion represents an obvious invasion of the jury's province, in violation of petitioner's rights under the Seventh Amendment to the Constitution, to decide a simple issue of fact pertaining to ordinary standards of conduct. It thereby dilutes a Jones Act seaman's right to a trial by jury and substitutes instead a trial by experts on simple issues of obvious danger.

The majority opinion also invades the trial Court's function to decide whether there is need for an expert in light of a record where no testimony by an expert on naval architecture was offered by either party at the trial, nor required by the trial Court, unnecessary because the issue was simple and clearly visualized from substantial testimony and evidence offered by petitioner with respect to the obvious lack and need of a railing or other safety device on a platform without skid proof paint, adjacent to a man-sized opening, supplemented by clear photographs and complete diagrams made at the instance of respondent.

The dissenting opinion points to the majority's improper invasion of the jury's fact-finding function, relating it to a clearly erroneous blanket proposition that "any and all theories of negligence and/or unseaworthiness which might touch on the broad field of 'naval architecture' may be properly submitted to a jury only if supported by expert testimony".

On the second question presented, the trial Court's award of future maintenance for three years, based on a voluminous record of hospitalizations, medical treatment and permanent disability, is amplified by reasons expressed for the record by the trial Court (R. 139). This award is entirely consistent with the grievous injuries necessarily found by the jury on which its award of $110,000.00 was made, and the medical opinions as to future care and rehabilitation; erroneously reversed and meaninglessly remanded with the finality that " . . . the Supreme Court seems to have indicated that no payments should be made for future maintenance and cure" (p. 124 of 293 F. 2d). Respectfully, had the Court of Appeals required further findings on future maintenance, despite the full record and the trial Court's reasoning in support of this award, there should not have been a reversal but

a remand for amplification by the same trial Judge. On the basis of the record itself, however, the award for future maintenance should be reinstated by this Honorable Court.

POINT I

To reverse a general jury verdict in a seaman's case because an expert was not called to temper the jury's fact finding function where the compounded danger of an unprotected hole was "fairly obvious" and within a lay juror's experience and ken, is contrary to all decisional authorities on similar issues, and in disregard of this Court's clear and consistent mandate on the inviolable constitutional function of a Jones Act jury.

The record is replete with proof of the need for and absence of: a railing or "other safety devices", such as an ordinary rope line to grasp instead of the inadequate substitutes in the bulky radar cable enclosure or the thin metal stiffeners projecting from the sides of the tower; or skid-proof paint on the worn platform, as to which respondent had given false answers to interrogatories; or a simple flashlight to compensate for the long known inadequacy of the lighting in the radar tower. A railing or guard line would undoubtedly have afforded petitioner an immediate hand hold and also a guard to prevent his fall into the unprotected man-sized opening under the foreseeable dangers of a darkened radar tower, vibrating excessively in a pitching and rolling vessel proceeding at its record speed in a winter sea. Can a reasonable man deny there were conditions of "fairly obvious danger"?

On the simple issue of fact related to the need or feasibility of construction of a railing or lifeline on a platform, 31 feet up in an enclosed radar tower, alongside

a man-size opening, the majority below ignores the ample testimony for petitioner on the lack of a protective device and the need therefor, but instead requires the unnecessary testimony of a naval architect. If required in this case, it will become the *modus operandi* in every subsequent trial where a simple ship's fixture or appurtenance is involved. This will promote the evil of protracted trials, experts pitted against experts, compounding the wrong by an improper invasion of the jury's independent fact-finding function. The use of expert testimony should be sparing, and limited to complex factual issues beyond the lay juror's ken. Respondent did not offer an expert on naval architecture, nor was there any contention recorded by respondent that petitioner was so required on the clear and simple issues involved. Neither did the trial Court, in its discretion, require it.

The majority opinion below ignores a basic premise in the use of expert testimony, long ago expressed by this Court in an even more complicated issue on the construction of a patent, in *Winans* v. *The N. Y. and Erie Railroad Co.*, 62 U. S. 88, 21 How. (U. S.) 88, 101, 16 L. Ed. 68 (1858), as follows:

> "Experience has shown that opposite opinions of persons professing to be experts, may be obtained to any amount; and it often occurs that not only many days, but even weeks are consumed in cross examinations, to test the skill or knowledge of such witnesses and the correctness of their opinions, wasting the time and wearying the patience of both court and jury; and perplexing instead of elucidating the questions involved in the issue".

The New York Court of Appeals held long ago that the doubtful purpose and partisan effect of expert testimony

should not be freely allowed to confuse and dilute a juror's independent determination of truth. In *Roberts* v. *N.Y. & Erie R. Co.*, 1891, 128 N. Y. 456, 464, Peckham *J.*, wrote for the Court to reject the use of expert testimony on the more complex issue of damages sustained by a property owner by reason of injury to his easements of light, air and access, following construction of the elevated 3rd Avenue Railroad, as follows:

> "Expert evidence, so-called, or, in other words, evidence of the mere opinion of witnesses, has been used to such an extent that the evidence given by them has come to be looked upon with great suspicion by both courts and juries, and the fact has become very plain that in any case where opinion evidence is admissible, the particular kind of an opinion desired by any party to the investigation can be readily procured by paying the market price therefor. We have said lately that the rules admitting the opinions of experts should not be unnecessarily extended, because experience has shown it is much safer to confine the testimony of witnesses to facts in all cases where that is practicable, and leave the jury to exercise their judgment and experience on the facts proved. As is stated by Earl, J., in Ferguson v. Hubbell, 97 N. Y. 507, 49 Am. Rep. 544, 'It is generally safer to take the judgments of unskilled jurors than the opinions of hired and generally biased experts.'"

There was sufficient evidence of the need for a railing or other safety device, such as a rope line to guide and protect plaintiff while in complete darkness, for skid-proof paint on the platform proper, or even a flashlight that was not provided, to allow plaintiff to move safely on the platform to the crow's nest.

Any layman is familiar with platforms and ladders. The usual partly inclined ladder or stairway with railings can readily be compared from his everyday experiences with a vertical ladder to be ascended to a point where the platform without a railing or line for support is behind and beyond an opening 31 feet deep. To hold that a railing to grab, or a safety device in the nature of a guard line or similar hand-hold, must be the subject of testimony by a naval architect, is equivalent to a holding that a jury is not fit to pass on simple issues of obvious danger in any case. This is the sense of the dissent herein and the common sense of the matter.

The basic rules in the use of expert testimony are clearly ignored by the majority opinion below. They are set forth in a leading text on the subject, Rogers, *The Law of Expert Testimony*, 3rd Ed., 1941, Matthew Bender, Inc., Albany, N. Y., at pp. 50, 51, as follows:

> "Within the rule excluding such evidence are ordinary standards of conduct of safety or danger, the operation of well known natural laws and the existence of social customs . . . If the facts can be placed before a jury and are of such a nature that jurors generally are just as competent to form opinions in reference to them and draw inferences from them as witnesses, the opinion of experts cannot be received. The fact that the expert witness may know more of the subject and better comprehend and appreciate it than the jury is not sufficient to warrant the introduction of his testimony".

See *Schillie* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 222 F. 2d 810, 814, that:

> "The determination of its admissibility is largely within the discretion of the trial court under the peculiar circumstances of each case."

Decisional references to the need for simple railings or guard-lines around open holes, particularly for deep openings on merchant vessels, necessarily prompt the conclusion that the obvious danger in the instant case was within a jury's province to determine "ordinary standards of conduct of safety or danger", supported by the testimony of Terry, Tribble, Richards and others who testified from their immediate experience and expertise on the particular factual situation involved, which testimony was supplemented by photographs and diagrams.

In *Zinnel* v. *United States Shipping Board Emergency Fleet Corp.*, 10 F. 2d 47 (C. C. A. 2d, Dec. 1925), Learned Hand, *C.J.*, wrote that a seaman ordered upon deck cargo without being provided a guard line was deserving of jury determination without an expert's opinion, as follows:

> "Without some guard line we need no expert to show us that a case was presented, which a jury must decide, as to the safety of the place where the intestate was ordered to work. Indeed, it seems to us hard to see how a jury could find for the defendant on this issue, as well as on the issue of the absence of the line" (p. 48 of 10 F. 2d).

Augustus N. Hand, *C.J.*, in *Kennair* v. *Mississippi Shipping Co., Inc.*, 197 F. 2d 605 (C. C. A. 2d, June 1952) held for a seaman who fell through an unlighted elevator shaft, by affirming a jury verdict predicated on the absence of an indicator or other device on deck to show where the elevator was at a given time. A similar contention to that involved herein was answered as follows:

> "It is urged by the defendant that there is no evidence in the record as to what type of safety device a reasonably prudent shipowner would have, nor any evidence as to what precautions were taken on other

> vessels. But such evidence was not necessary; for it was the function of the jury to apply the standard of care—what was reasonable under the circumstances—to the facts presented to it. *Bailey* v. *Central Vermont Ry., Inc.*, 319 U. S. 350, 353, 63 S. Ct. 1062, 87 L. Ed. 1444" (p. 606 of 197 F. 2d).

To require a marine architect to testify on the need for or the feasibility of construction of a railing or the placement of a life line at and about an unilluminated hole, 31 feet deep, through which a person's body could and did fall, is to drastically reduce the fact-finding function of a jury in a seaman's case. Cases are legion on the inviolability of a federal jury's function and need not be cited. See: *Ferguson* v. *Moore-McCormack Lines, Inc.*, 352 U. S. 521, 77 S. Ct. 457; *Michalic* v. *Cleveland Tankers, Inc.*, 364 U. S. 325, 81 S. Ct. 6, 11 (Nov. 7, 1960); *Schultz* v. *Pennsylvania Railroad Co.*, 350 U. S. 523, 76 S. Ct. 608.

This Court in *Mahnich* v. *Southern S.S. Co.*, 321 U. S. 96, 98, 64 S. Ct. 455, held that "A finding of seaworthiness is usually a finding of fact", and at p. 104 related it to "supply and keep in order the proper appliances appurtenant to the ship". On the basis of the majority reasoning below in the instant case, a defective rope or cable should not prompt liability unless there be testimony by an expert that "proper marine architecture" requires an adequate one that could "feasibly" be manufactured. Such result is no less strained than that related to a railing or line on a platform adjacent to a man-size opening in the enclosed radar tower.

Clark, *C.J.*, in *Krey* v. *U. S.* (C. C. A. 2d, Dec. 1941), 123 F. 2d 1008 at p. 1010, pertinently held on the absence of any handle or rail in a ship's shower-room while the vessel was in port, much less dangerous than the instant factual situation, as follows:

"Viewed as a shower to be used at sea, the absence of any sort of handle or rail for support is alone almost enough to condemn it."

As the absence of a railing or similar device was held to be a simple issue and clearly unsafe in the cases cited above, without the need for an expert to tell the obvious, then how much more unnecessary is an expert where the absence of any rail or line is in the context of a speeding vessel at sea, the radar tower subject to excessive vibration, compounded by the long inadequate and then foreseeable total absence of any illumination?

This Court in *Milwaukee & St. P. R. Co.* v. *Kellog*, 94 U. S. 469, affirming 5 Dill. 537, 1 Cent. Law J. 278, long ago expressed the maxim that experts are not permitted to state their conclusions where the subject of proposed inquiry is a matter of common observation upon which the lay or uneducated mind is capable of forming a judgment. This principle was recently followed by McNally, *J.*, in *Clark* v. *Iceland Steamship Company, Ltd.*, 179 N. Y. S. 2d 708, 6 A. D. 2d 544 (App. Div. 1st Dept., Nov. 1958), holding that opinion evidence was inadmissible as to adequacy or inadequacy of ship construction related to the absence of a life line between stowed hatch covers and the ship's rail. He wrote that seaworthiness is generally a jury question, not to be tempered by an expert's opinion, where the need of a life line was so clearly within the "ken of the experience, observation and knowledge of laymen" (p. 714 of 179 N. Y. S. 2d). Plaintiff's verdict was therefore reversed on the very ground that would have affirmed it in the instant case.

See: *Desrochers* v. *United States*, 105 F. 2d 919, 920 (C. C. A. 2, July 1939).

The strict and non-delegable obligations owed a seaman by his employer far transcend any obligations owed another on land, as a seaman "ties his fate to that of the ship", *Pope & Talbot* v. *Hawn*, 346 U. S. 406, 424. As the obligation of care is so much greater, the danger of a man-sized deep hole without a railing or other safety device for crossing over from a difficult position on a straight ladder is more sharply visualized and simpler to understand than where a parallel danger exists on land. In *Badger* v. *United Orthodox Synagogue*, 148 Conn. 449, 172 A. 2d 192 (1961), the Supreme Court of Errors held that an unlighted porch without a suitable railing was an issue of fact that did not require expert testimony. The instant case is therefore *a fortiori*.

Recently the United States Court of Appeals for the Fifth Circuit (June 30, 1961), in *Pure Oil Co.* v. *Snipes*, 293 F. 2d 60, at p. 71, wrote as follows:

> "More than that, there was a serious issue about the absence of any guard rail on the tank top. The evidence showed, as the permanent ladder manifested, an expectation that men would work on the tank top from time to time. True, no specific word testimony was offered that on some other rig the tank tops generally had a rail. Evidence was received, however, that such a rail would have been easily installed at little expense. *This was not a matter necessarily requiring expert testimony. The jury could have concluded that at that height, considering the curved surface and the possibility of falling onto the platform and perhaps into the sea, a prudent platform owner would have had some protective device.* Of course the matter is not to be determined by what is usual and customary. That may be evidence of due care, or the lack of it, but it is not the end itself. Quite apart from a ques-

> tion whether the Coast Guard regulations, note 10, supra, techni ally cover the tank top, it is evident from §§143.15-1, 15-5, Title 33 C.F.R., that the Coast Guard considers that one of the principal hazards is that of falling from great heights. *As a matter of everyday common sense the jury may well have thought the same here.*" (Italics supplied.)

The obvious liability following failure to provide a handhold or rail was expressed by Dawson, *D.J.*, in *Campbell* v. *Tidewater*, 141 F. Supp. 431 (U. S. D. C., S. D. N.Y., June 1956), citing the authority of *Schirm* v. *Dene Steam Shipping Co.*, 222 F. 587, as follows:

> "If a ladder is set on such a substantial incline that, in order to maintain his equilibrium, the user is compelled to hold himself away from the ladder, then, of course, he must have a handrail, or something else extending above the ladder, to hold on" (p. 435 of 141 F. Supp.).

See: *The Leontios Teryazos*, 45 F. Supp. 618, 622, the Court stating:

> "A ship should not be regarded as seaworthy unless there is some protective means to prevent its employees from falling down into the bunker. To hold otherwise would be a return to the dark past when little protection was afforded men of the sea."

It was the burden of respondent to establish instead that the construction of a railing or other safety device on an indoor platform would not be "feasible" from the standpoint of naval architecture. This it did not do. There is neither a complex issue nor any reason to support the need for expert testimony on this subject by either side.

The issue is not on the sufficiency of evidence *per se*, as the Court of Appeals stated there was substantial evidence sufficient to support a judgment. The issue is whether a lay jury could understand this substantial evidence without the refined explanation by a self-styled expert. If this be so, respondent failed to substantiate its own defense and contention on appeal as to the non-feasibility of construction of a railing or other safety device. It did not except to any question related to expert testimony, as none was raised. As there was no expert offered by either side, obviously the evidence submitted without being tempered by such testimony should be deemed sufficient to support the instruction on railings or other safety devices.

As a result of the general verdict petitioner established the negligence of respondent and the unseaworthiness of its vessel. It is unquestioned that all the lights were out when petitioner slipped and fell, and that he slipped and fell because of the multiple dangers known to respondent's responsible officers and crew-members. Respondent was bound by all issues submitted and the jury verdict was conclusive on all issues raised by the pleadings and submitted to the jury.

Where the conditions are aggravated by the absence of illumination, then the cases are even stricter on a shipowner with respect to the clear and simple requirement of a handrail or similar device. In *Read* v. *United States*, 201 F. 2d 758 (C. C. A. 3, February 1953), on the allegations of failing to provide sufficient lighting facilities and also to provide safeguards around the open deep tanks, solely on the issue of defective lighting appliances it was held there was a "failure to supply and keep in order the proper appliances appurtenant to the ship" so as to prompt unseaworthiness.

Also in point is *Johnson* v. *Griffiths S.S. Co.*, 150 F. 2d 224 (C. C. A. 9, June 1945), where the body of a seaman was found in an open hatch under conditions of poor visibility, and other dangers, including pitching of the vessel. Under these circumstances the Court held as follows:

> "It is the duty of a vessel to provide a safe working place for members of its crew. What does it matter which one or how many of the negligent conditions caused the injury . . . Under these circumstances the maintenance of an open hatch with no lifeline about it constitutes negligence which is so closely related to the injury in this case as to impel the conclusion that it was the proximate cause of the death" (p. 226 of 150 F. 2d).

Rhetorically, need a naval architect testify on the construction of a simple railing, or easy placement of a line, where a hypothetical question must include the facts of pitching, vibration, the 31-foot hole and the absence of any illumination? The issue is simple and the answer obvious.

By incorporating the FELA, 45 USC 51 *et seq.*, into the Jones Act, the following holding by this Court in *Rogers* v. *Missouri Pacific Railroad Co.*, 352 U. S. 500, 77 S. Ct. 443, is pertinent:

> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought" (p. 506 of 352 U. S.).

In accord:

Ferguson v. *Moore-McCormack Lines, Inc., supra.*

In *Socony-Vacuum Oil Co.* v. *Smith*, 305 U. S. 424, 431, 59 S. Ct. 262, this Court expressed its liberal interpretation of the Jones Act, stating that seamen were "wards of the admiralty." Accord therefore should be given to the jury's verdict on the issues submitted under the Jones Act and related unseaworthiness causes of action. See *Jacob* v. *City of New York*, 315 U. S. 752, 62 S. Ct. 854.

POINT II

Uniform principles of general maritime law, heretofore expressed by this Court, are severely disrupted where the majority below would impose a novel burden on a seaman to prove in addition to an unsafe place to work and or unseaworthiness, that the shipowner could have "feasibly" corrected its breaches of an absolute duty.

The test of reasonable fitness was not met by respondent in light of the unanimous jury verdict and the record on which it was based. Its absolute, continuing and nondelegable obligation to a seaman, here breached in multiple respects, cannot be excused by imposing on petitioner a novel and additional burden of proving that which was unsafe and unseaworthy could have "feasibly" been made safe and seaworthy. Petitioner's burden should have been no more than to convince a jury by the fair preponderance of the evidence that the facts he asserted are more probably true than false. *Burch* v. *Reading Co.*, 240 F. 2d 574, cert. den. 353 U. S. 965, 77 S. Ct. 1049; *Lavender* v. *Kurn*, 327 U. S. 645, 653, 66 S. Ct. 740, 744; *Chalonec* v. *Mathiesen's Tanker Industries, Inc.*, 287 F. 2d 929, 931.

Reference to the specific words in the instruction prompting reversal below must disclose that it conforms to the record, to the proper performance of a Judge's function

in relation to reasonable inferences a jury may make from the proof, and is in compliance with basic principles of negligence. The majority below now requires a new test of sufficiency of evidence in a negligence case. No longer is an instruction sufficient that negligence might follow on the failure to provide a railing or other safety device around an open hole, but an additional requirement is stated now that petitioner must further prove defendant could have "feasibly" constructed a simple protective device to make the place safe and seaworthy. Respectfully, this stretches petitioner's burden of proof to the breaking point of unreasonableness.

In this light petitioner respectfully refers again to the dissenting opinion below, particularly where reference is made to the feasibility of constructing a railing on an indoor platform (which also means to provide a simple life line as used on every vessel); and that the burden to show such a simple undertaking could not be done should properly devolve on the shipowner. See: *The Pennsylvania*, 86 U. S. 125; *Mason* v. *Lynch Brothers Company*, 228 F. 2d 709, 712; *Hill, Jr.* v. *Atlantic Navigation Company*, 218 F. 2d 654.

The late Jerome Frank, *C.J.*, in his concurring opinion on a shipowner's failure to provide garbage chutes, pertinently stated the following in *Poignant* v. *U. S.*, 225 F. 2d 595, 602:

> "Here the defendant owed plaintiff an absolute duty to provide a safe place to work. It may well be that, if defendant were to prove that there were no means, reasonably available, to keep the passageway free of garbage, the existence of the dangerous condition would not have constituted unseaworthiness; *but the*

fact of such unavailability is a defense which defendant has the burden of proving." (Italics supplied.)

See: *The Edith Godden*, 23 Fed. 43.

Inconsistently, the majority opinion below concedes that the general verdict is supported by substantial proof in the record. A new curiosity is advanced that the jury verdict was not conclusive on all issues raised by the pleadings and submitted to the jury because a small part of the Charge, raised in passing in the briefs below and not even referred to in oral argument, renders wholly defective a general verdict sought by the parties without a request for special interrogatories.

On the uncontradicted fact that there was a total absence of any illumination at the time of accident, compounded by the prolonged absence of illumination from the upper two lights, a directed verdict for plaintiff on the ground that this condition at the very least contributed to the accident, was necessary and proper. We are taught that seaworthiness is not dependent on the span of time between failure of equipment and injury. *Mitchell* v. *Trawler Racer*, 362 U. S. 539, 80 S. Ct. 926, and *Petterson* v. *Alaska Shipping Co.*, 205 F. 2d 478, aff'd 347 U. S. 396. A bulb that fails is not reasonably fit for its purpose of giving illumination. Accordingly, this would make immaterial any error of instruction related to finding liability. See Rule 61, F. R. C. P. on "Harmless Error."

POINT III

The issue of future maintenance was properly left to the trial judge by the parties and his award in favor of petitioner was based on substantial proof and proper inferences, and was not clearly erroneous, nor does any decision by this Court hold that "no payments should be made for future maintenance and cure".

It is apparent that the fabric of maritime law as it pertains to maintenance for a seaman is severely disrupted by the majority opinion. Without any basis in a definitive ruling by this Court the majority below concludes that ". . . the Supreme Court seems to have indicated that no payments should be made for future maintenance and cure." The reference to Mr. Justice Jackson's opinion in *Farrell* v. *U. S.*, 336 U. S. 511, 69 S. Ct. 707, is inapposite to the instant facts and taken out of context.

Despite the trial Court's proper exercise of discretion in awarding future maintenance, in tandem with the heretofore respected and traditional province of trial Courts in the admission or exclusion of expert testimony, he was reversed without reference to the principle on review expressed in *McAllister* v. *U. S.*, 348 U. S. 19. Is this not a continuation of a new approach, without sanction by this Court, expressed for non-jury cases in *Romero* v. *Garcia & Diaz, Inc.*, 286 F. 2d 347, whereby the Court of Appeals for the Second Circuit held that its scope of review is expansive to the extent that it may review the evidentiary basis of findings and conclusions, "Despite possible negative inferences that might have been drawn from *McAllister* v. *United States*, 348 U. S. 19 (1954)" (p. 355 of 286 F. 2d)?

The issue on maintenance was withheld from the jury in strict compliance with the conditions expressed by the same Court in *Bartholomew* v. *Universe Tankships Inc.*, 279 F. 2d 911. Reversal herein was grounded in an improper standard in reviewing the medical evidence and reasonable inferences to be drawn therefrom. See: *Sentilles* v. *Inter-Caribbean Shipping Corp.*, 361 U. S. 107, 80 S. Ct. 173.

There is no room to cite the many cases on awards for future maintenance in accord with the principle expressed in Gilmore and Black, *The Law of Admiralty*, The Foundation Press, Inc., 1957, p. 268, as follows:

> "The amount awarded for maintenance lies largely in the discretion of the trial judge."

When maintenance ends is a question of fact to be determined on the basis of the evidence presented. *Ziegler* v. *Marine Transport Line*, 78 F. Supp. 216; *Jones* v. *Waterman Steamship Corp.*, 155 F. 2d 992. With respect to the principle of *Calmar Steamship Corp.* v. *Taylor*, 303 U. S. 525, 58 S. Ct. 651, there is recognition that future lump sum payments can be made "*in the discretion of the Court*, such amounts as may be needful in the immediate future for the maintenance and cure of a kind and for a period which can be definitely ascertained" (pp. 531 and 532 of 303 U. S., italics supplied). That the *Calmar* decision was not meant to limit an award for future maintenance was discussed in *Moyle* v. *National Petroleum Transport Corp.*, 150 F. 2d 840, and also in *Loverich* v. *Warner Co.*, 118 F. 2d 690, by the Court of Appeals for the Third Circuit. The advantage and consistency of lump sum payments is expressed in Gilmore and Black, *The Law of Admiralty, supra,* on page 266 as follows:

> "It follows that the seaman may bring successive suits and that a prior recovery will not bar a subsequent action. Usually of course, even in a disputed case, one trip to the courts will settle the issue for the parties, and no instance has been found of a maintenance and cure claimant actually bringing more than one action against the same employer."

This text also discusses the leading maintenance cases on pages 264 and 265 and points out that there can be a distinction where the ship's fault prompted the injury, as contrasted with a shoreside accident to a seaman on shore leave, where the maintenance items are not duplicated in the damage action, as in the instant case. Certainly a pre-existing illness or a shoreside accident to a seaman on furlough cannot be compared to the instant accident and causally related disabilities.

With respect to the period of future maintenance, a conservative estimate of three years, in *Muruaga* v. *United States, et al.*, 172 F. 2d 318, the Court stated as follows:

> "What allowances in money for maintenance and cure in addition to hospitalization and treatment actually furnished have been made in other cases and the time periods on which those allowances have been based are irrelevant. Each case is to be decided on its own established facts" (p. 321 of 172 F. 2d).

In accord:

Brown v. *Dravo Corp.*, 258 F. 2d 704.

In light of the above, it is apparent that comparing petitioner's past inability to attain the maximum benefits of medical attention with what he can reasonably expect in

the future, the extent of the injuries; that petitioner is still an outpatient for rehabilitation, a former alien, now an American citizen, perhaps much later capable only of performing sedentary work beyond his training and experience as a seaman, that the award for three years was eminently fair and conservative. The award is in fair perspective with the jury's verdict for liability damages in the amount of $110,000.00. A further consideration, as expressed in Gilmore and Black, *supra,* is that our courts should not be congested by periodic and frequent actions for maintenance which could be readily disposed of in one determination.

The Court of Appeals did not hold that the trial Court's recorded reasons to support the award of future maintenance were clearly erroneous, but simply substituted its own judgment for that of the trial Judge. In so doing, it violated the standards laid down by this Court in *McAllister* v. *U. S., supra,* and the reasonable inferences to be drawn from medical testimony expressed by this Court in *Sentilles* v. *Inter-Caribbean Shipping Corp., supra.* At the very least, if more formal findings were required, the Court of Appeals should have remanded this cause to the same trial Judge.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the Court of Appeals should be reversed except as to its affirmance of the award for past maintenance.

Respectfully submitted,

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